

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1262

To be argued by
HOWARD W. GOLDSTEIN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1262

UNITED STATES OF AMERICA,

—v.—

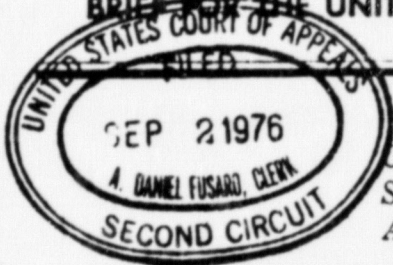
HARVEY OST,

Defendant-Appellant.

B
P/S
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Case	2
A. Synopsis	2
B. The Proof at Trial	3
1. The Feferholtz Account	3
2. The Destruction of WOH Records	4
3. The Diversion of Corporate Assets	5
The Defense Case	8
A. Synopsis	8
B. The Testimony	9
1. The Feferholtz Account	9
2. The General Atronics Bond	10
3. "Out of Area" Rent	11
4. Underwriting Expenses	12
The Government's Rebuttal Case	13
ARGUMENT:	
POINT I—The Judgment Was Supported By Ample Evidence	13
CONCLUSION	20

TABLE OF CASES

<i>Helvering v. Horst</i> , 311 U.S. 112 (1940)	18
<i>Holland v. United States</i> , 348 U.S. 121 (1954)	14

	PAGE
<i>Hyland v. Commissioner</i> , 175 F.2d 422 (2d Cir. 1949)	19
<i>Wolder v. Commissioner</i> , 493 F.2d 608 (2d Cir.), cert. denied, 419 U.S. 828	19
<i>United States v. Alvarado</i> , 321 F.2d 336 (2d Cir. 1963), cert. denied, 375 U.S. 987 (1964)	20
<i>United States v. Arcuri</i> , 405 F.2d 691 (2d Cir. 1968), cert. denied, 395 U.S. 913 (1969)	14
<i>United States v. Floyd</i> , 496 F.2d 982 (2d Cir.), cert. denied, 419 U.S. 1069 (1974)	14
<i>United States v. Frank</i> , 494 F.2d 145 (2d Cir.), cert. denied, 419 U.S. 828 (1974)	14
<i>United States v. Freeman</i> , 498 F.2d 569 (2d Cir. 1974)	14
<i>United States v. Gerry</i> , 515 F.2d 130 (2d Cir.), cert. denied, 44 U.S.L.W. 3201 (U.S. Oct. 7, 1975) ..	14
<i>United States v. Grunewald</i> , 233 F.2d 556 (2d Cir. 1956), rev'd on other grounds, 353 U.S. 391 (1957)	19
<i>United States v. Mariani</i> , Dkt. No. 76-1075, slip op. 5045 (2d Cir., July 19, 1976)	17
<i>United States v. McCarthy</i> , 473 F.2d 300 (2d Cir. 1972)	14
<i>United States v. McGuire</i> , 381 F.2d 306 (2d Cir. 1967), cert. denied, 389 U.S. 1053 1968)	20
<i>United States v. Pui Kan Lam</i> , 483 F.2d 1202 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974) ..	14
<i>United States v. Juarez</i> , 380 F.2d 713 (2d Cir. 1967)	20
<i>United States v. Taylor</i> , 464 F.2d 240 (2d Cir. 1972)	14

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UNITED STATES OF AMERICA,

Appellee,

—v.—

HARVEY OST,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Harvey Ost appeals from a judgment of conviction entered on May 26, 1976, in the United States District Court for the Southern District of New York, after a two-day trial before the Honorable John M. Cannella, United States District Judge, sitting without a jury.

Indictment 75 Cr. 391, filed on April 15, 1975, charged Ost with attempting to evade a substantial portion of the income tax due and owing for the calendar year 1968, in violation of Title 26, United States Code, Section 7201, and with knowingly making and subscribing a false verified joint tax return for the calendar year 1968, in violation of Title 26, United States Code, Section 7206(1).

Trial commenced on September 22, 1975 and concluded on September 24, 1975. On October 30, 1975, after post-

trial memoranda had been submitted, Judge Cannella found Ost guilty on both counts.

On May 26, 1976, Judge Cannella sentenced Ost on Count One to a four month period of imprisonment and a \$5000 fine and on Count Two to three years imprisonment, execution of sentence suspended, with probation for three years and a \$5000 fine.

Statement of Facts

The Government's Case

A. Synopsis

During 1968, defendant Harvey Ost was one of three principals of Weinberg, Ost and Hayton, Inc. ("WOH"), a New York brokerage firm which specialized in over-the-counter transactions. In that year, a nominee account was established at WOH in the maiden name of Ost's wife, Selma Feferholtz (the "Feferholtz" account), by taking 150 shares of stock out of a firm trading account. Ost received the profits from the Feferholtz account, which consisted of short term capital gains in the amount of \$41,021.75. In addition, Ost received income from various corporate assets which he and his partners diverted to their own personal use. In particular, Ost received (1) \$1,027.81, in short term capital gains from the sale of a bond he received at no cost from a firm trading account; (2) \$4,966.67, which was designated "out of area" rent in the WOH 1968 general ledger and (3) \$5,353.33, which was designated "underwriting expenses" in the WOH 1968 general ledger. This income was not reported on Ost's income tax return for the calendar year 1968.

The Government's direct case consisted of thirty-eight documentary exhibits and the testimony of James V. O'Brien, Sr., WOH's head cashier from December 1967, through November 1968, Aaron Schwinger, WOH's certified public accountant from 1964 through 1970, and James A. King, a special agent of the Internal Revenue Service. In addition, Arnold Freilich, assistant cashier at WOH in 1968 until his promotion to head cashier in December, 1968, testified as a rebuttal witness for the Government.

B. The Proof at Trial

1. The Feferholtz Account

The Government's proof at trial established that in early September 1968 a customer account in the name of Selma Feferholtz, 42-10 Colden Street, Flushing, New York, was established at WOH. (GX 35).^{*} Selma Feferholtz was the maiden name of Ost's wife (GX 34; Tr. 21), and 42-10 Colden Street, Flushing, New York was the address of Ost's mother, Tessie Ost. (GX 36; Tr. 21). Despite the fact that all other customer ledgers at WOH were kept in the bookkeeping room in a container known as the "tub" (Tr. 24), when O'Brien looked for the Feferholtz account ledger on several occasions, he found it in Ost's possession. (Tr. 24). Moreover, the IRS agents did not find the original Selma Feferholtz customer ledger (of which GX 35 is a copy) in the bound alphabetically arranged volume of WOH customer ledgers. (GX 17; Tr. 141).

The first transaction reflected in the Feferholtz account ledger was the receipt for no money of 50 shares

^{*} The abbreviation "GX" refers to Government Exhibits; "DX" refers to Defense Exhibits; "Tr." refers to the trial transcript and "App." refers to the defendant's appendix.

of Metallurgical International stock. (GX 35). O'Brien testified that, upon discovering 50 shares of Metallurgical International stock missing from one of WOH's trading accounts, he told Ost, who replied "forget about it, I will take care of it." (Tr. 25-26).^{*} The missing securities were never returned to the firm trading account. Nor was any money credited to the trading account. (Tr. 23).

The Feferholtz account ledger reflected in total twenty-eight transactions. In twenty-seven of them, the stock purchased was sold on the same day. All of the transactions were profitable and the short term capital gain realized on those transactions, including the \$5,370.50 Metallurgical International profit, was \$41,021.75. (GX 35; Tr. 22-23).

Eighteen checks, totalling \$32,425, were issued and debited against the Feferholtz account. (Tr. 23). O'Brien testified that those checks were drawn on the instructions of Ost and given to Ost personally in his office. (Tr. 24-25).

2. The Destruction of WOH records

Agent King testified that in 1971 and 1972 he reviewed WOH records for 1968 and was unable to locate any cancelled checks payable to Selma Feferholtz among the approximately 100,000 cancelled checks kept by WOH. (Tr. 140). King also testified that he examined the WOH daily blotters for the period September 3, 1968 through November 1968 (GX 1-9), in an effort to

^{*} A total of 150 shares of Metallurgical International stock was placed without cost, in the Feferholtz account. Those shares were ultimately sold for an aggregate short term capital gain of \$5,370.50. (GX 35; Tr. 23).

locate the Selma Feferholtz account transactions. Only one such transaction was located because the bindings on the daily blotters had been cut and the pages which should have reflected the Feferholtz account transactions had been removed. (Tr. 141-43).

This destruction of WOH records was put in context by O'Brien's testimony that in 1971 Ost gave him two WOH cancelled checks payable to O'Brien's first wife, told O'Brien that O'Brien was under investigation by the Internal Revenue Service for tax evasion, and further told him that "the doors would be open over the weekend and it would not be a bad idea to have a fire." (Tr. 36).*

None of the securities transactions contained in the Selma Feferholtz account was reported on Ost's income tax return for the calendar year 1968. (GX 33; Tr. 137-38).

3. The Diversion of Corporate Assets

Despite the \$359,890.44 net profit reflected in WOH's eleven month operating statement (GX 21), WOH showed a net profit of only \$119,894.65 on its United States Corporate Income Tax Return for 1968. (GX 32; Tr. 106-07). The Government's proof at trial established that that reduction was achieved, at least in part, by the diversion of corporate assets, by a variety of means, to each of the firm's principals.

The WOH daily blotter for October 22, 1968 reflected that on that date, six General Atronics bonds were

* The destruction of records was also put in context by Freilich's testimony that Ost had suborned perjury. See p. 13 *infra*.

debited against WOH Trading Account B on Ost's instructions * and distributed as follows: three to Alvin Cohen, one to Ed Hayton, one to Sidney Weinberg and one to the defendant Ost. (GX 6; Tr. 26-27, 32).** Ost's personal customer account ledger showed that a General Atronics bond was received without payment on October 22, 1968 and that the only General Atronics bond in the account was sold for \$1,027.81 on December 16, 1968. (GX 12, 19, 21; Tr. 33-34).*** On December 20, 1968 a check for \$1,027.81 was issued and debited against Ost's account. (GX 12 at 19, GX 21).

Schwinger testified that in the early part of 1969 he spoke to Ost about an entry in Trading Account B (GX 15) which indicated a similar distribution of Spedcor Corporation stock. Ost told Schwinger that the entry was "fool-proof" and that Alvin Cohen, the trader responsible for Trading Account B, "knew about it." Mr. Cohen told Schwinger "[t]hat was the way they wanted to take the money out of the corporation." (Tr. 107-10).

Money was also taken out of the corporation by other devices. Thus, although WOH charged no more than \$2,298.33 to rent in any of the first nine months of

* There were approximately five WOH trading accounts, each designated by a letter of the alphabet. Trading Account A was the firm account and all profits realized from it were profits of the firm. Trading Account B was operated by Alvin Cohen, a firm trader. Fifty percent of the profits from that account went to Mr. Cohen and fifty percent belonged to the firm. (Tr. 50,108).

** Those bonds were delivered out of Trading Account B on October 22, 1968 "as per H.J.O." and were treated as a loss equal to the cost basis of the bonds (\$5,842.74) on the WOH profit and loss account. (GX 15; Tr. 28-31).

*** The bond, certificate number RM1672, was delivered out of WOH custody on December 16, 1968. (GX 12, 20).

1968, and although all of WOH's leases related to space in its office building at 52 Broadway, New York, New York (Tr. 87), the 1968 general ledger showed "out of area" rent expenses of \$5400 on October 31, 1968, \$5400 on November 4, 1968, \$2100 on December 10, 1968 and \$2000 on December 19, 1968. (GX 24, Account 122).

Of those "rent expenses," the Government adduced direct proof that Ost received \$3600 of the funds taken out of the corporation and circumstantial evidence that he received another \$1,366.67. The WOH daily blotters showed that three checks, each in the amount of \$1800 and charged to rent, were issued to "H.J.O.," "S.W." and E. Hayton" * on both October 31, 1968 and November 4, 1968. (GX 7 at 25, GX 8 at 21). In addition, checks in the amount of \$2100, with no payee listed, and \$2000, payable to "cash" were issued on December 10, 1968 and December 19, 1968, respectively and charged to rent. (GX 11 at 33, GX 12 at 28).**

Finally, the Government's proof showed that \$16,000 in non-existent "underwriting expenses" had been "written off" in the books of WOH. Those expenses related to four underwritings. In each instance, expenses were charged to the underwriting long after the closing, with the time lags ranging from four to six months. Furthermore, in each instance, the checks issued and charged to the underwriting were issued to either an unidentified payee or "cash". (Tr. 95-103). Schwinger identified the underwriting transactions in the WOH books. He also testified that during his career as a certified public accountant he had approximately six clients who were

* In the November 4, 1968 blotter, Ed Hayton is denoted "E.H."

** One-third of the amount of those checks was attributed to defendant Ost in accordance with the pattern established with respect to the other "out of area" rent payments.

broker-dealers of securities and who acted as underwriters on approximately thirty-six occasions. (Tr. 93). In his experience, an underwriter usually received an expense allowance from the issuer of securities, which was disbursed at the time of the closing from the proceeds of the underwriting. With the exception of WOH, none of his underwriting clients books reflected underwriting expenses four months after the closing. (Tr. 93-94).*

None of the income derived from WOH assets diverted to his personal use by Ost was reflected in Ost's 1968 income tax return. (GX 33).**

The Defense Case

A. Synopsis.

The defense case consisted of twelve documentary exhibits and the testimony of the defendant as well as that of Jerome Cohan, a friend of defendant, Sidney Weinberg, president of WOH and Edward Hayton, executive vice-president of WOH. Ost contended that (1) some of the funds attributed to him as income were never received by him (the proceeds of the Feferholtz account and the "underwriting expenses"); (2) some of the funds attributed to him as income were proper reimbursement for business expenses (the "out of area"

* With respect to the underwriting expenses, the Government, arguing that the evidence established a pattern of corporate assets being diverted by the WOH principals and being divided in thirds, contended that one third of the \$16,000 in underwriting expenses (\$5,333) was received by Ost.

** Finally, the Government proved that Ost wrongfully claimed his mother as a dependent in 1968 despite the fact that his mother's tax return, which he personally prepared, reflected \$12,598.43 in interest and capital gain income.

rent) and (3) some of the funds, if received, were insubstantial and inadvertently omitted from his tax return (the proceeds of the General Atronics bond).

B. The Testimony.

1. The Feferholtz Account.

The three WOH principals testified that the Feferholtz account was established as a result of an August, 1968 meeting in Hayton's office in which back office workers led by O'Brien demanded both that Ost stay out of the back office and that cash bonuses be paid to the workers.* (Tr. 185-87, 218-19, 245-47). They testified that it was a firm trading account, the profits from which were originally intended to be used to pay the back office workers' cash bonuses, but which, when it was learned that O'Brien was leaving WOH, were ultimately used to repay a \$100,000 loan to the firm by Cohan. (Tr. 187-89, 220, 251-52). Weinberg testified that he did the trading for the Feferholtz account (Tr. 184),** and

* On cross-examination, Hayton was unable to remember the name of any back office employee other than O'Brien who attended the meeting or was to receive a cash bonus. (Tr. 226-27). Ost testified that he saw Freilich attend the meeting, but Freilich testified he never heard any discussion of cash bonuses. (Tr. 245, 294).

Ost, accordingly to the defense, was not present at the meeting (Tr. 244), but participated in a subsequent meeting with his partners at which, according to the defense, it was decided to establish the Feferholtz account. (Tr. 245-47).

** On cross-examination, Weinberg was "not sure" whether prior to trial he told Assistant United States Attorney Richard Wile that he had never heard of the Feferholtz account and did not recall telling Wile that he could not remember whether he was the trader responsible for that account. (Tr. 196). On those details, as well as others about which he was questioned on cross-examination, Weinberg's memory was poor, even though his memory was faultless on direct examination with respect to events of the same year. (Tr. 199).

Hayton testified that the Feferholtz account transactions were recorded in a trading ledger. (Tr. 227) *

The carefully constructed defense story failed to explain the following: (1) why the Feferholtz account, if in fact a trading account, was kept in a customer ledger; (2) why the WOH general ledger for 1968, which reflected all other trading accounts, did not include a summary of the Feferholtz account; (3) why, if the decision had been made to use the Feferholtz account proceeds to repay a loan in view of O'Brien's imminent departure, checks were drawn on it in "odd" amounts (*e.g.*, \$1,912.50 on October 8, 1968) prior to the consummation of the loan and after O'Brien had given notice in mid-September; (4) why the principals of WOH, who had decided not to pay cash bonuses because O'Brien was leaving and might take other employees with him, paid \$11,530 in bonuses on December 20, 1968; and (5) why the back office employees of WOH, who had militantly threatened to quit unless they received cash bonuses, apparently accepted the management decision not to pay these bonuses.

2. The General Atronics Bond.

With respect to the General Atronics bond, Ost testified that Alvin Cohen had told him that there had been a distribution of General Atronics bonds and that Cohen had sold the bond received by Ost. (Tr. 241). He further testified that although shortly thereafter Cohen told him the sale would be cancelled and the defendant approved of the cancellation, he forgot about the transaction. (Tr. 241-42). WOH went out of business in December 1970. Ost testified that at about that time he re-

* They were not. (GX 35; Tr. 17-18).

ceived an interest check from General Atronics which reminded him of the transaction and prompted him to secure a replacement bond. (DX L; Tr. 242). Ost testified he never received the original bond.

The story told by Ost could not explain: (1) why the WOH business records indicated that the General Atronics bond distribution was made pursuant to his instructions; (2) how Cohen had authority to execute transactions for the defendant's account; (3) why the defendant's customer account ledger did not reflect the cancellation of the bond sale allegedly affected by Cohen; and (4) why the bond allegedly sent to the defendant by General Atronics as a replacement bore a different number than the bond received by defendant on October 22, 1968. (GX 12 at 20; DX L).*

3. "Out of Area" Rent.

With respect to the "out of area" rent, Ost testified that the \$3600 he received was reimbursement for postage, telephone and entertainment expenses he incurred while working at home in a room he used solely as an office. He further testified that the actual expenses he incurred at home exceeded the reimbursement he received by \$2000 to \$3000. (Tr. 262-65).**

* With respect to Ost's claim that the income derived from the sale of the bond, if received, was insubstantial, we note that the income derived was equal to approximately two-thirds of the short-term capital gain that the defendant did report for 1968 and to approximately ten percent of defendant's reported taxable income.

** Both Weinberg and Hayton also testified that the \$3600 they had each received was reimbursement for business expenses incurred at home and that their actual expenses exceeded \$3600. (Tr. 194-95, 221-22).

The story told by Ost with respect to these items failed to explain: (1) why, if the money received was reimbursement for postage, telephone and entertainment expenses, it was not charged to those categories on the WOH books; and (2) why, if the defendant actually incurred business expenses at home, the amount by which those expenses exceeded the reimbursement was not taken as a deduction. The latter was particularly telling since Ost took such minor deductions as a \$1 charitable deduction for a contribution to Cancer Care. (GX 33).

4. Underwriting Expenses.

Finally, with respect to the "underwriting expenses", Ost testified that WOH incurred both travel and entertainment expenses and salesman reimbursement expenses after its underwritings (Tr. 267). Weinberg testified that WOH incurred substantial expenses in connection with its underwritings in attempts to promote "after-markets" and that a large portion of those expenses was reimbursement to WOH part-time salesmen. (Tr. 191-92). Hayton, who was directly involved with WOH underwritings, testified that WOH incurred public relations expenses after a closing in connection with selling the new issues to customers. (Tr. 223-24).^{*} Ost denied receiving any portion of the \$16,060.00 of "underwriting expenses" for which WOH issued checks to cash or unidentified payees in December, 1968. (Tr. 268).

Ost wholly failed to produce supporting documentary evidence, such as the expense vouchers allegedly submitted by WOH part-time salesmen.

On cross-examination, Hayton admitted that such expenses were *not* underwriting expenses. (Tr. 231).

The Government's Rebuttal Case

On rebuttal, Freilich testified that four months prior to trial, Ost told him that twenty-five percent of the Feferholtz account profits was given to Hayton to make payoffs to secure underwritings for WOH such as Monroe Combining Corp. and E. C. Ernst, Inc.;

* that fifty percent of the profits was given to Weinberg to make payoffs which would direct business to WOH; and that the remaining twenty-five percent went to O'Brien for distribution to back office employees. Freilich further testified that he told Ost that he had never received money from O'Brien and that Ost responded by asking him if he would testify that he had received \$600 from O'Brien. Ost told Freilich that "if I did, I wouldn't have to worry about the consequences with the Government." (Tr. 285-86).

ARGUMENT

POINT I

The Judgment Was Supported By Ample Evidence.

Ost's sole contention is that in "the absence of substantial independent evidence on the income understatement element of the crimes charged, the trial court erroneously based its judgment of conviction on the circumstantial evidence tending to show only defendant's consciousness of guilt." (Br. at 17-18).^{**} This claim is

* Both issues were offered prior to the creation of the Feferholtz account. (GX 26, 28).

** Ost's argument that he was convicted of evasion of his individual income taxes while the evidence proved corporate tax evasion (Brief, Point II) necessarily rests on whether there was substantial evidence to support the court's judgment.

meritless, since there was ample evidence in the record from which Judge Cannella concluded beyond a reasonable doubt that Ost understated his income for 1968.*

It is well settled in this circuit that the test for determining the sufficiency of the evidence is

"whether upon the evidence, giving full play to the right of [the trier of fact] to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

United States v. Frank, 494 F.2d 145, 153 (2d Cir.), cert. denied, 419 U.S. 828 (1974); accord, *United States v. Freeman*, 498 F.2d 569, 571 (2d Cir. 1974); *United States v. Taylor*, 464 F.2d 240, 242-45 (2d Cir. 1972). Moreover, in applying this standard, circumstantial evidence is of no less value than direct evidence, see *Holland v. United States*, 348 U.S. 121, 140 (1954), the evidence must be viewed in the light most favorable to the Government, *United States v. Gerry*, 515 F.2d 130, 134 (2d Cir.), cert. denied, 44 U.S.L.W. 3201 (U.S. Oct. 7, 1975); *United States v. Floyd*, 496 F.2d 982, 987 (2d Cir.), cert. denied, 44 U.S.L.W. 3201 (U.S., Oct. 7, 1975); *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), and the Court must take into account the evidence presented by defendant in addition to that offered by the Government. *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974); *United States v. Arzari*, 405 F.2d 691, 695 (2d Cir. 1968), cert. denied, 395 U.S. 913 (1969). So viewed, there is no question but that the evidence in this case permitted the Court below to conclude beyond a reasonable doubt that Ost understated his 1968 income.

* Ost does not claim that the proof was insufficient to show wilfulness.

The evidence at trial clearly supported the inference that the Feferholtz account was not a firm trading account and that Ost personally received its proceeds.* While all of the WOH trading accounts bore a letter designation, the Feferholtz account bore the maiden name of Ost's wife. In addition, the address listed for the account was that of Ost's mother. These two facts were sufficient to permit the Court to infer that Ost had some control over the account. The conclusion that Ost's control was total and that the account was, in fact, his followed from the remainder of the evidence.**

Of particular import was the fact that despite Ost's lack of responsibility in the area of trading for the firm's accounts, Ost had custody of the Feferholtz account books. In addition, those books were customer ledgers—not trading ledgers. Most important, however was the fact that Ost personally ordered checks drawn on the Feferholtz account and O'Brien delivered the checks to Ost in Ost's office. There was, therefore, direct evidence that Ost received the proceeds from the Feferholtz account.

Faced with this evidence, which we submit was itself more than sufficient to support the Court's judgment, Ost chose to testify and to present defense witnesses in order to convince the Court of his innocence. However, when confronted with inculpatory transactions which the WOH financial records reflected were made pursuant to his instructions, Ost pleaded poor memory. (Tr. 275-77).

* Judge Cannella's findings focused solely on whether Ost received the proceeds of the Feferholtz account. We therefore do the same, noting, however, that the evidence adduced with respect to the diversion of corporate assets is highly probative of the issues raised with respect to the Feferholtz account. See pp. 18-19, *infra*.

** The Government was, of course, not required to negate the inference that Ost's wife exercised control over the account in view of the fact that the tax return in question was a joint tax return.

Incredibly, despite his education in accounting, Ost excused taking his mother as a deduction on his tax return, although she had substantial capital gain and interest income, on the ground that he thought income meant only salary. This claim was made even though Ost's own tax return listed capital gain and interest income.

Weinberg and Hayton fared no better. Weinberg repeatedly took refuge in a failing memory (Tr. 199); admitted that, in effect, he had been guilty of evading the taxes due on the General Atronics bond he received in 1968 (Tr. 199-201); and attempted to prevent the Court from learning the true facts regarding WOH's suspension by the SEC and his own problems with the SEC. (Tr. 197-98, 214-15). In addition, Weinberg's cross-examination made it crystal clear that he had lied when interviewed by Assistant United States Attorney Wile and had deliberately avoided a Grand Jury subpoena. (Tr. 195-97). Hayton, moreover, could not provide the names of any back office employee other than O'Brien who attended the "important" meeting at which cash bonuses were discussed (Tr. 226-27) and testified falsely both that the Feferholtz transactions were recorded in a trading ledger and that the profits from the Feferholtz account were reflected in the WOH corporate records. (Tr. 227).

All of this provided abundant support for Judge Cannella finding that "the demeanor of the witnesses testifying to [the defense explanation] was such that the Court finds it to have been a fabrication which strongly indicates consciousness of guilt."

Contrary to Ost's suggestion, having concluded that Ost and the other defense witnesses perjured themselves, the Court below was entitled to consider that fact as

further affirmative evidence in support of the Government's case. As this Court recently held in *United States v. Mariani*, Dkt. No. 76-1075, slip op. 5045, 5052 (2d Cir. July 19, 1976), a trier of fact faced with discrepancies in a defendant's story may

"rationally discredit [a defendant's] entire story about the innocent purposes of his actions, *United States v. Pui Kan Lam*, *supra*, 483 F.2d at 1208, or interpret its incredibility as further support for a contrary inference. *United States v. Arcuri*, *supra*, 405 F.2d at 695; *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952)."

Ost now argues that (1) the Court below concluded that the Feferholtz account and its proceeds were his on the basis of the facts that the account bore the maiden name of his wife and the address of his mother; (2) that the Court's conclusion was unwarranted because there was evidence that the Feferholtz account was a firm trading account started with firm funds which are presumed to remain firm funds; and (3) that, therefore, the only evidence on which the Court could and did rely was evidence of consciousness of guilt. However, Ost's attempt to extricate himself from the Government's proof by resort to this process of syllogistic reasoning necessarily fails because of the inaccuracy of both its major and minor premises.

First, as we have already noted, there was ample evidence, in addition to the use of Ost's wife's maiden name and his mother's address, to show that the Feferholtz account was Ost's. Indeed, there was direct proof that Ost received the proceeds of the account.

Second, Ost misplaces his reliance on the facts (1) that the Feferholtz account consisted of same day purchases and sales, (2) all of which were gains and (3)

on none of which were commissions charged, to show that the account was a firm account. As to the former two, neither is inconsistent with a finding that Ost operated the account for his benefit and received its proceeds.* As to the latter, the evidence proved, and Judge Cannella explicitly found, that "other favored individual accounts were similarly not charged commissions." (A. 215a).

Third, Ost incorrectly relies on the fact that the Feferholtz account was started with assets taken from a firm trading account to argue that Ost did not have "unfettered control" over the proceeds of the account even if he did receive them, and that, therefore, the income from the account belonged to WOH. In view of the substantial evidence that Ost was either personally diverting, or participating in the diversion of, WOH assets to his own use, defendant's argument borders on the frivolous.**

Moreover, there was evidence in the record that defendant did have the ability to "control" WOH funds. As the Court noted in *Helvering v. Horst*, 311 U.S. 112, 118 (1940), cited by defendant, "the power to dispose of income is the equivalent of ownership of it." In the in-

* The inference was for the Court to draw. See pp. 19-20, *infra*.

** Ost suggests that the gain from the first transaction in the Feferholtz account might have been "turned over in the others" and that, therefore, the aggregate gain was income to the original owner of the stock—WOH. (Brief at 22). In the alternative, the defendant suggests that if the traded stock was from another source, there was no evidence to show that the defendant supplied the funds. Those arguments widely miss the mark. The Feferholtz account shows the deposit of a \$15,000 check shortly after its creation, thereby negating any possible "turn over" theory. (GX 35). But more important, there was evidence that the defendant received the funds, whatever their source might have been.

stant case, the record reflected that Ost had complete authority to sign checks drawn on WOH and that he had such checks delivered to him. (Tr. 25, 61A-62). It simply is no defense that defendant, in addition to evading his taxes, stole from his company to start the account.*

In the final analysis, shorn of its elaborate trappings, Ost's argument is that the Court below could conceivably have, and therefore definitely should have, believed his witnesses and his explanation. Thus, for example, Ost states that "[t]he defendant's explanation that the Cohan loan was believed necessary as a protection for claims by customers seems credible" (Br. at 26); that "a mere general observation of demeanor should be insufficient to support a finding the testimony was untrue" (Br. at 27); and that "while the trial court disbelieved him, Weinberg's testimony on this point rings true." (Br. at 23). That argument, however, and with it the basis for Ost's appeal, is based on a fundamental misconception of this Court's function.

In *United States v. Grunewald*, 233 F.2d 556, 563 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957), this Court, in rejecting defendant's contention that the trial court should have drawn those inferences favoring acquittal and directed a verdict for defendant in a case where there were conflicting inferences, stated:

* The cases cited by defendant with respect to "unfettered control" are inapposite. In *Wolder v. Commissioner*, 493 F.2d 608 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974), the taxpayer-beneficiary was held not to have constructive possession of stock at the time of the testator's death since the taxpayer was only one of two executors and the stock was in his coexecutor's possession in a custodian account. In *Hyland v. Commissioner*, 175 F.2d 422 (2d Cir. 1949), there was no evidence in the record that the taxpayer could draw checks on his corporation's bank account.

"It is not our function to decide questions of credibility or to choose between conflicting possible inferences, whether taken piecemeal or otherwise."

That the resolution of issues of credibility is for the trier of fact and will not be disturbed by this Court is by now axiomatic. See, e.g., *United States v. McGuire*, 381 F.2d 306, 315 (2d Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968); *United States v. Suarez*, 380 F.2d 713, 716 (2d Cir. 1967); *United States v. Alvarado*, 321 F.2d 336, 339 (2d Cir. 1963), *cert. denied*, 375 U.S. 987 (1964).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HOWARD W. GOLDSTEIN being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the *2nd* day of *September*, 1976,
he served *2* copies of the within brief by placing the same
in a properly postpaid franked envelope addressed:

MICHAEL I. SALTZMAN
ONE ROCKEFELLER PLAZA
NEW YORK, NEW YORK 10020

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Howard W. Goldstein

Sworn to before me this

2nd day of *September*
Alma Hansen

ALMA HANSON
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Commission Expires March 30, 1978